CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 2020

LEVEL 6 - UNIT 14 – LAW OF WILLS & SUCCESSION

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the September 2020 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' **comments contained within this report,** which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

Candidates tend to find the essay questions more challenging, and performance is weaker than for the Section B questions. Essay questions require evidence of knowledge relevant to the question in appropriate detail and with appropriate citation. Candidates are then required to show understanding through analysis. A common area for improvement is in the skill of analysis with many answers being descriptive only. Occasionally, candidates omitted to arrive at a reasoned conclusion even where the question directed them to do so.

In some cases, candidates also had a tendency to wander from the focus of the question into an area that was not relevant e.g. Section A, Question 1 where some candidates wrote about knowledge and approval. It is suggested that candidates consider spending a few minutes planning an outline of their answer.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1(a)

On the whole, one of the better answered questions which as attempted by the majority of candidates. Marks were lost by some for failing to refer to the common law burden of proof where capacity is questioned and for failing to point out how Banks V Goodfellow is reinforced by the 2005 Mental Capacity Act.

Question 1(b)

While most candidates were aware of the rule in Parker v Felgate (1883) very few went on to say that the rule should be applied with caution but is justified in death bed situations. Only a handful of candidates mentioned the rule in Perrins v Holland and Others (2010) in which a significant time gap appeared between approval and signing of the will.

Question 2

Generally, the rules regarding revocation were well cited, with good application of case law. The stronger candidates said that destruction should not be merely symbolic and that the degree of capacity to revoke is the same as that required to make a will.

Question 3(a)

The three requirements for a DMC to be valid were correctly stated by most candidates with appropriate references to case law. Even though the question invited an analysis, few accepted this challenge then went on to say whether DMC serve any useful purpose today and of the scope for abuse.

Question 3(b)

Well answered by most candidates, apart from a few who did not arrive at a logical conclusion.

Question 4

It was pleasing that most candidates are fully aware of the entitlements of the surviving spouse/civil partner on intestacy. Very few however referred to the old rules in order to explain how generous the new provisions are and that the children can be disadvantaged because of the changes by ITPA 2014, especially when the surviving spouse is the deceased's second or third marriage.

Section B

Question 1(a)

It was concerning that some candidates did not know that to be valid the alterations should be witnessed by both witnesses. Some candidates stated the rules regarding alterations to wills without applying these rules to the three legacies.

Question 1(b)

Some good responses.

Question 1(c)

Some poor responses owing to the candidates' unfamiliarity with the rule in Rainbird v Smith (2012). These weaker scripts incorrectly said that Jahil would receive a quarter share in the estate rather than nothing.

Question 2

An unpopular question with some inadequate answers.

Question 3

Surprisingly, given the numbers involved, some excellent answers with candidates knowing how the rules work and recognising the available assets and how the legacies will abate proportionately. Better answers fully itemised parts 1-6 of the statutory order and applied these rules to the question.

Question 4

Again, it is encouraging that candidates are now fully aware of the surviving spouse/civil partner's rights on intestacy. The oil painting did cause difficulties for several candidates who failed to appreciate that it was still owned by Tina at her death and so forms part of her estate. Nonetheless, most could explain how the children take on the statutory trusts, the effect of a contingent interest and how adopted children are treated on an intestacy.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 14 – LAW OF WILLS & SUCCESSION

SECTION A

Question 1(a)

The traditional common law test for mental capacity to make a valid Will was established in the leading case of Banks v Goodfellow (1870) where Cockburn CJ stated that a testator must have a "sound and disposing mind and memory".

There is a three-stage requirement that must be satisfied for the testator to be mentally competent under the common law test.

Firstly, the testator must understand the nature of the act he is engaged in. This requires that the testator understands that he is making a Will that takes effect upon his death and not some other document.

Secondly, the testator must be able to recall the extent of his property. However, case law shows that he does not need to recall every item that he owns; a general awareness of his property is sufficient (see Wood v Smith (1993) and Schrader v Schrader (2013)). The simpler the Will is, this may indicate that a lower degree of mental capacity is required (see In the Estate of Park (1954)).

Thirdly, the testator must be able to recall those persons who may have a moral claim upon him, even if he chooses not to benefit them (Harwood v Baker (1840)). For example, in Boughton v Knight (1873) Sir James Hannan stated, "[The testator] may disinherit the children, and leave property to strangers in order to gratify spite, or to charities to gratify pride". Therefore, a testator is free to make a Will where he is "moved by capricious, frivolous, mean or bad motives" as stated in Fuller v Strum (2002). Arguably, this element of the common law test has become somewhat limited in scope, as persons with a moral claim may now be able to make a claim for reasonable financial provision out of the deceased's estate under the Inheritance (Provision for Family and Dependants) Act 1975.

A further consideration is that the testator must not be suffering from a delusion of the mind that causes him not to benefit those people. So, for example, if a testator leaves his daughter out of his Will due to an "insane delusion" which has "poisoned his natural affections" towards her, he will be held to be lacking mental capacity (Dew v Clark (1826) and Banks).

The Mental Capacity Act 2005 (MCA 2005), which came into force on 1 October 2007, sets out a general statutory test of mental capacity relating to a person's informed decisions about their health, welfare and finances. Section 1 of the MCA 2005 establishes a presumption of mental capacity for all persons, unless a lack of mental capacity is actually proven. This is hard to reconcile with the common law burden of proof, which shifts back and forth but ultimately is always on the propounder of the Will to prove mental capacity.

Section 2(1) states that a person lacks capacity if at the material time he is unable to make a decision for himself because of an impairment of, or a disturbance in the functioning of, the mind or brain.

Section 3 provides guidance as to when a person is considered unable to make a decision for himself. The overall focus of s3 is on whether or not the person can understand all the relevant information surrounding the decision and the reasonably foreseeable consequences of making such a decision. However, as illustrated in Re Walker (2014), testators are not required to understand all the information or the foreseeable consequences.

Previously, it was unclear whether the MCA 2005 statutory test had replaced the common law mental capacity test. However, more recent case law such as Scammell v Farmer (2008) Re Walker (2014) and Elliott v Simmonds (2016) appear to assert that the correct test is still that from the leading case in Banks v Goodfellow (1870), although Scammell concerned a testatrix's capacity before the MCA 2005came into force.

Thus, unless and until we have a definitive statement from the Court of Appeal or the Supreme Court, the common law test appears to remain the sole test for testamentary mental capacity, at least in practice.

However, the MCA 2005 is not entirely redundant in the area of testamentary capacity. It appears to have assisted in the development of the common law test to accommodate the medically recognised effects bereavement can have upon rational decision-making. In Key v Key (2010) the court recognised for the first time that the effects of bereavement on a testator could negatively impact upon his mental capacity. In Re Wilson (2013) the testatrix's Will was held invalid due to her deep grief at the recent death of her brother.

In conclusion, the position in English law is now clearer: the Banks v Goodfellow test is still very much being used as the sole test for testamentary mental capacity. However, although a long-established test, as it accommodates changes towards assessing mental capacity in the 21st century, it appears not to be without influence from the MCA 2005.

Question 1(b)

The general principle is that testators must have mental capacity at the time they execute their Will. For example, in Ewing v Bennett (2001) the Court of Appeal upheld a Will where the testatrix was in the early stages of dementia, and the fact that she lacked mental capacity after execution of the Will was irrelevant.

However, an exception under the rule in Parker v Felgate (1883) applies where a testator lacks mental capacity at execution, but is capable of understanding and does understand that he is executing a Will which his solicitor has prepared according to his previous instructions given when he had mental capacity (Re Flynn 1982).

Clearly, the rule is justified in deathbed situations to allow instructions that have been given by a deteriorating testator shortly before they lose capacity and then executed within a short period before their death. In Parker the testatrix was roused from a coma to execute her Will, for which she had previously given instructions. However, can the rule ever be justified when it is used where an intermediary conveys the instructions from the testator to the solicitor? In Battan Singh v Amirchand (1948) the Privy Council did not apply the rule where the instructions were given to a lay intermediary to pass to the solicitor. Lord Normand pointed out the obvious risks and stated that in this situation the rule should be applied 'with the greatest caution and reserve' as 'the opportunities for error in transmission and of misunderstanding and of deception in such a situation are obvious…there is no ground for suspicion'. More recently, however, the Court of Appeal in Perrins v Holland and Others (2010) approved the use of the rule, where there was a significant period of 18 months between the giving of instructions and the signing of the Will, and the lay intermediary was the beneficiary under the Will. At first instance, Lewison J pointed out the justification of the rule on the grounds of testamentary freedom. Arguably, this case goes beyond the limits of reasonable justification for the application of the rule.

In conclusion, the rule in Parker v Felgate, despite being an anomaly, is a justifiable departure only when it is confined to the most exceptional circumstances, such as those akin to deathbed executions, and when the warning in Amirchand is strictly observed.

Question 2

As emphasised in the leading case of Cheese v Lovejoy (1877), "all the destroying in the world without intention will not revoke a Will, nor all the intention in the world without destroying: there must be the two" per James LJ. There must be an actual and not merely symbolic "burning, tearing or otherwise destroying'. For example, in Stephens v Taprell (1840) a testator who had struck through the body of the Will, the names of the witnesses and his signature had not carried out an act of destruction. Similarly, in Cheese v Lovejoy itself the Court of Appeal (CA) held that a testator who had merely crossed through various parts of his Will and written on the back of the Will "all these are revoked" had only at best attempted a symbolic destruction without carrying out an actual act of destruction. Even though this was obviously contrary to the testator's intention, the Will was upheld.

However, the act of destruction does not need to destroy the whole Will provided there is sufficient damage to impair the entirety of the Will. In Hobbs v Knight (1838), the court held that the 'essence' of the Will was destroyed when the testator cut out his signature, which was a sufficient act of destruction.

Similarly, in Re Adams (1990) the entirety of the Will had been impaired where the signature of the witnesses and the testatrix had been heavily scored out with a pen (see also In the Goods of Morton (1887)).

Furthermore, the testator must complete the act of destruction that he intended, and intention must be present throughout the act of destruction. In Perkes v Perkes (1820) a hostile testator, during an argument with one of the beneficiaries named in the Will, tore his Will into four pieces. However, another person stopped him from doing further damage. After he had calmed down, he fitted the pieces back together and said, "it is a good job it is no worse". The court held that the Will had not been destroyed, as the testator had not completed everything that he had intended by way of destruction.

Section 20 Wills Act 1837 permits the act of destruction to be carried out by 'some other person' in the testator's 'presence and by his direction'.

'Presence' requires the testator to be both mentally and physically present when the act of destruction occurs.

Physical presence requires that there is a line of sight between the testator and the act of destruction of the Will, as illustrated in In the Goods of Dadds (1857) (where a Will burnt in a separate room from the testator was held not to be a valid revocation by destruction). Similarly, in In the Estate of Kremer (1965) a testatrix had telephoned her solicitor and instructed him to destroy the Will, which the solicitor did. The court held that revocation had not occurred, as the act of destruction was not performed in the testatrix's presence.

While the act of destruction is carried out, the testator must also have the intention of revoking the Will. Thus, if a Will is destroyed by an accident or due to a mistake, there can be no intention to revoke.

In Re Booth (1926) the necessary intention was missing where a Will was accidentally destroyed by fire. In Giles v Warren (1872) the testator lacked

intention while he tore his Will into pieces, because he mistakenly believed the Will was invalid.

Intention requires that the testator has mental capacity. The degree of capacity is the same as is required to make a Will: the testator must have a sound and disposing mind and memory. For example, in Brunt v Brunt (1873) a testator who tore his Will into pieces while drunk and suffering from an attack of delirium tremens was held to lack capacity to revoke his Will by destruction.

The courts will presume the testator had an intention to revoke his Will in two situations; both can be rebutted by evidence to the contrary.

First, if a Will is missing at the testator's death but was last known to be in his possession, the courts will presume that the testator destroyed the Will with the intention of revoking it. In Sugden v Lord St Leonards (1876) the CA held the presumption had been rebutted even though the Will could not be found on the testator's death. The evidence showed that although the Will and eight codicils had been kept locked in a box to which he held a key, others had access to a spare key. Furthermore, he often asked his daughter to recite the contents to him; she was, therefore, able to provide a reasonable account of its contents, which was consistent with the codicils.

Secondly, if a Will is found to be torn or mutilated at the testator's death and it was last known to be in his possession, the courts will presume that the testator destroyed it with the intention of revoking it.

Question 3(a)

A *donatio mortis causa* (DMC) is a gift which becomes absolute only on death and it remains revocable until death. It is sometimes considered to be controversial because it does not have to comply with the rules contained in s9 Wills Act 1837 (WA 1837). This is because a person who is close to death may not have the opportunity or time to have a formal Will prepared and executed.

There are three requirements for a DMC to be valid.

First, the donor must be contemplating his impending death. This means the donor should be contemplating death in the near future for a specific reason, such as an impending operation. Importantly, the donor must have good reason to anticipate death in the near future from an identified cause. The gift will lapse automatically if the donor does not die soon enough. In Wilkes v Allington (1931), although the donor knew that he was dying from cancer, he in fact died from pneumonia. The court decided the gift was still valid. Other examples include Re Cravens Estate (No 1) (1937), Birch v Treasury Solicitor (1951), Re Lillingston (1952) and Sen v Headley (1991).

Secondly, the gift must be conditional on the donor's death. The requirement is that the gift must be made under circumstances, which show that the subject matter of the gift is to revert to the donor if he recovers.

In cases where early death is inevitable, the law relaxes this requirement. If property is handed over during the last days of a donor's illness, it is more likely to be treated as a DMC, as in Gardner v Parker (1818).

Thirdly, the donor must deliver "dominion" over the subject matter of the gift. Dominion can mean physical possession of the subject matter or some means of accessing the subject matter, such as a key to a box, or documents evidencing entitlement to possession of the subject matter. Examples include Woodard v Woodard (1995), and Vallee v Birchwood (2013). In the important case of King v Chiltern Dog Rescue and Redwings Horse Sanctuary (2015), the court considered the doctrine of DMC and stated that it is open to abuse and so strict proof of compliance with the three requirements is essential. The court emphasised that a DMC has distinct risks and can easily lead to fraudulent claims. It enables a donor to transfer property upon his death without complying with any of the rules in s9 WA 1837, thereby paving the way for all of the abuses which the statute was intended to prevent. In giving his judgment, Jackson LJ expressed mystification over why the common law has adopted the doctrine of DMC at all.

Although it served a useful purpose previously, it serves little useful purpose today, except possibly as a means of validating deathbed gifts. Although a Will may have been prepared with the assistance of a solicitor and in the absence of the beneficiaries, there are no such safeguards during a deathbed conversation. The words in a Will are plain to see, but there may be scope for disagreement about what the donor said to those visiting him in his final hours of life. Consequently, the court stressed that DMCs must be kept within their limitations. The court stated that Vallee v Birchwood was wrongly decided due to the length of time, namely four months, between the donor making the gift of his house to his daughter and his subsequent death. It said that the donor had ample opportunity to take advice and make a Will, and although the donor was elderly and appeared to be in poor health, he was not anticipating death from any known cause. Consequently, the court was promoting its preference for Wills executed in accordance with the statutory rules rather than upholding DMC's which bypass the safeguards provided by those rules.

Question 3(b)

A document is not admissible to probate if it does not comply with the formal requirements of s9 WA 1837. However, a testator may include the terms of another unattested document as part of the Will which has been duly executed. The doctrine of incorporation by reference permits the admission of such documents provided that three requirements are met. These requirements are strictly applied if incorporation of the unexecuted document is to be allowed.

First, the document must already be in existence when the Will is executed. If the document comes into existence after the Will is executed, but before the execution of a codicil confirming the Will, this requirement is satisfied because the Will is treated as having been re-executed at the date of execution of the codicil.

Secondly, the document must be referred to as being already in existence when the Will is executed. If the document comes into existence between the execution of the Will and a codicil, this requirement is only satisfied if the Will refers to the document as being in existence, as in In the Goods of Smart (1902). In University College of North Wales v Taylor (1908) a testator made a gift by Will which was conditional on compliance with "any memorandum found in my papers". As this could refer to a document not in existence at the date of the Will, the document had not been validly incorporated. A similar

decision was reached in Re Bateman's Will Trust (1970) where the Will referred to "such persons as shall be stated".

Thirdly, the document must be described in the Will in sufficient detail to enable it to be identified. If the identification is vague, then it will not be incorporated, an example being In the Goods of Garnett (1894).

Incorporation by reference can avoid filling a Will with long lists and enable a testator to include items in a separate document. Although this may be more convenient, the terms of the incorporated document, like the Will itself, will be open to public scrutiny. Consequently, incorporation by reference does not enable the contents of that document to be kept secret. As there are strict requirements for incorporation of a document, it seems that the formalities in s9 WA 1837 are not necessarily undermined.

Question 4

A total intestacy occurs where a person dies without leaving a valid Will and the rules and entitlement that apply to a surviving spouse or civil partner are contained in the Administration of Estates Act 1925 (AEA 1925) as amended by the Inheritance & Trustees' Powers Act 2014 (ITPA 2014) and the Intestates Estate Act 1952 (IEA 1952).

The ITPA 2014 followed the Law Commission's report, "Intestacy and Family Provision Claims on Death" (Law Comm. No 331) published in 2011 which addressed the interaction of social trends on the rules and process of intestacy, particularly those concerning the surviving spouse or civil partner. Since IPTA 2014 came into effect on 1st October 2014, it has fundamentally changed the position of a surviving spouse or civil partner of an intestate. A surviving spouse or civil partner includes, for this purpose, surviving partners of a registered civil partnership and same-sex marriages (Civil Partnership Act 2004 and Marriage (Same Sex Couples) Act 2013) but not surviving divorced spouses (Re Seaford (1968)) or judicially separated spouses or civil partners following a dissolution.

After 30 September 2014, a surviving spouse's or civil partner's entitlement is governed by the statutory order of priority in s46 AEA 1925 (as amended) and is entirely dependent upon whether the intestate left behind surviving children; the surviving spouse or civil partner no longer shares the estate with any surviving parents or full siblings of the intestate (s1 ITPA 2014). Thus, if the intestate does not leave any surviving children (or issue of predeceased children according to the per stirpes rule in s47 AEA 1925), the surviving spouse or civil partner takes the entire estate.

Although providing a welcome simplification of the rules, the exclusion of remoter family members purely in favour of the surviving spouse or civil partner may be regarded as too generous. However, the change reflects the expectations of the majority of the public (Nuffield Survey 2010) and apparently the position undertaken by the majority of Will makers. Furthermore, remoter family members maintained by the deceased may make an application for financial provision under the Inheritance Provision for Family & Dependents Act 1975, although this can be rather costly and an added complication.

Where there are surviving children (or issue of predeceased children), the surviving spouse or civil partner takes three distinct entitlements, each of

which has been amended since 2014 (s46 AEA 1925 and ITPA 2014) and most of which entail a reduction in the children's entitlement.

First, the surviving spouse or civil partner takes a statutory legacy of £250,000 plus interest (£270,000 wef February 2020). There is now a statutory mechanism for updating the level of statutory legacy specified by the Lord Chancellor at intervals of no more than five years and index-linked (unless the Lord Chancellor specifies otherwise) to the Consumer Price Index where it rises by more than 15% (ITPA 2014 s2 and Sch. 1). Furthermore, interest on the statutory legacy is simple, not compound (s1(2)) and is now set at the Bank of England official bank rate applicable on the date of the intestate's death. The old higher rate of 6% was considered to be out of touch with commercial interest rates and unfairly disadvantaged other beneficiaries of the intestate's estate.

Secondly, the surviving spouse or civil partner receives all the intestate's personal chattels as defined in s55(1)(x) Administration of Estates Act 1925 (as amended by ITPA 2014 s3). The previous definition was an antiquated and complex list of specific and general classes of personal items (such as "articles of household or personal use or ornament"). It is now a modern definition consisting of "all tangible movable property" - which continues to exclude "money, securities for money and property the deceased used solely or mainly for business purposes" (upholding, it appears, the dominant purpose test in Re Maculloch's Estate (1981)). However, it also excludes property "held solely as an investment." Although the new definition should simplify the classification of property as a personal chattel, problems may arise with items at the intestate's death "held solely as an investment". These items are likely to be of significant value, they are, therefore, likely to prove highly contentious, particularly when collections of valuable items are involved.

Thirdly, the surviving spouse or civil partner receives half of the remainder of the estate absolutely, whilst the remaining half is distributed equally among the intestate's children (taking into account the per stirpes rule in s47 AEA 1925). This replaces the old rule which saw the surviving spouse or civil partner receive half the residuary estate for their life and on remainder it passed to the children equally (or if there were no surviving children to a surviving parent or siblings of the full blood). Now that there is no longer a life interest, the surviving spouse or civil partner receives the capital, not merely the income and interest. This change ensures that no longer are there complicated rules concerning capitalisation of the surviving spouse or civil partner's life interest (s47A(1) AEA 1925) or those governing the administration and costs of the running of a trust, especially when the life interest is in a small fund. Moreover, the change impacts upon the need for there to be two personal representatives or a trust corporation whenever there is a life interest (s114 (2) Senior Courts Act 1981): it only applies now if there are minor children of the deceased.

Additional rights now also come into play. The surviving spouse or civil partner has a special right to require within 12 months of the grant of representation by signed writing that the personal representatives appropriate the matrimonial home in satisfaction of an absolute interest (IEA 1952, Sched 2). This will be significant where the family home is solely owned by the intestate or is owned under a beneficial tenancy in common. It has no application where the home is owned by the deceased under a beneficial joint tenancy with another, in which case it passes to the survivor under the doctrine of survivorship. If the family home is worth more than the surviving spouse's or

civil partner's entitlements they can make up the difference by an equalisation payment (Re Phelps (1980); the date of the valuation of the house is that of the time of appropriation and not that of the intestate's death (Re Collins (1975). Moreover, if the surviving spouse or civil partner is the sole personal representative, they must apply in writing to the court, appoint another personal representative or obtain the consent of all adult beneficiaries (Kane v Radley-Kane and Others (1998)).

A further special rule is the 28-day survivorship rule found in s46(2A) AEA 1925, which provides that a spouse or civil partner must survive the intestate by 28 days to take any of the intestate's estate (other than property held with the intestate under a joint tenancy).

In conclusion, the special rules and changes to the surviving spouse's or civil partner's entitlement have had the required effect of increasing the surviving spouse's or civil partner's entitlement, and in particular are an attempt to safeguard her/his position in relation to being able to remain in the matrimonial home. Alternatively, it can be argued that the new rules put too much emphasis on the rights of surviving spouses or civil partners and not enough emphasis on children, who stand to lose out as a result of ITPA 2014, especially when the surviving spouse or civil partner relationship arose from the deceased's second or third marriage or civil partnership.

SECTION B

Question 1(a)

Section 21 Wills Act 1837 (WA 1837) provides that no obliteration, interlineation or other alteration in a Will shall be valid or have any effect, except so far as the words before such alteration shall not be apparent, unless such alteration shall be executed in the same way as required for the execution of a Will.

In gift 1 of Amelia's Will, the alteration is not initialled by the witnesses to the Will, and the original amount is still apparent. Consequently, even though the alteration appears to have been signed by Amelia, it is ineffective and the beneficiary will only receive the original gift of £2,000. In gift 2, the line deleting the amount of the gift is neither initialled by Amelia or the witnesses, and again the original wording is apparent. Consequently, the alteration is ineffective and the beneficiary receives only the original gift of £1,000.

In gift 3, the alteration is not initialled by the witnesses to the Will and the original amount of the gift to Eliza has been obliterated and is not apparent within the meaning of s21 WA 1837. This means that if the wording cannot be read by 'natural means', such as holding the paper up to the light or by using a magnifying glass, as stated in Re Itter (1950). Normally, the gift therefore fails and falls into residue. However, Amelia not only obliterated the original amount but also inserted a new legacy of £5,000. The presumption, therefore, is that she only made the alteration on the basis that the new legacy was valid. This is known as the doctrine of conditional revocation. The effect of this is that it enables the 'forbidden methods', such as infra-red photography, to be used to discover the original wording. This doctrine was applied in Re Itter where strips of paper were removed to ascertain the original wording. Consequently, although the replacement wording is not valid, if the original wording can be identified by the forbidden methods, this would enable

the original gift to be paid to Eliza. However, if the original wording cannot be discovered, then the gift fails and falls into the residuary estate.

Question 1(b)

The personal representative, Diana, has a duty to distribute the estate correctly, including taking all reasonable steps to find Ishram. She should therefore take the following steps. First, she should advertise and search in accordance with s27 Trustee Act 1925 (TA 1925). This means placing advertisements in the London Gazette and in newspapers circulating nearest to where Ishram was last known to be living. However, Diana should be advised that such advertisements will not protect her because she does know of Ishram's existence. Consequently, she should also be advised to consider applying to the court for a Benjamin Order for her protection. In Re Benjamin (1902), the testator left a residuary gift to someone who had disappeared nine months before the testator died. Despite advertisements having been made, the beneficiary's whereabouts remained unknown and the court permitted distribution of the estate on the basis that the beneficiary had predeceased the testator. If Diana is authorised to distribute the estate she will be protected as a personal representative, but could be pursued by Ishram, if he appears, in her capacity of a beneficiary. Alternatively, Diana could take out an insurance policy indemnifying her against liability if she were to be sued by Ishram. This could be just as effective as a Benjamin Order and incur less costs. Another alternative would be for her to seek an indemnity from the residuary beneficiaries (in this case herself and Geesha) who may be being overpaid. As they are two of the three residuary beneficiaries, the risk is substantially reduced. This would be the most cost effective method.

Diana could also seek a declaration from the High Court that Ishram is deemed to have died. The court has the power to make such a declaration under the Presumption of Death Act 2013, if the missing person is not known to have been alive for a period of at least seven years. Although this would be an alternative to seeking a Benjamin Order or indemnity insurance, it would incur considerable cost.

With regards to the gift of the holiday home in gift 4, as Farouch has predeceased Amelia this gift will fall into residue. The property is valuable and makes it all the more important that the above steps are taken.

Question 1(c)

Section 33(1) WA 1837 provides an exception to the doctrine of lapse where property is left in a Will by a testator to his children or remoter issue. Specifically, it states that where a Will makes a bequest to a child or remoter descendant of the testator and the intended beneficiary dies before the testator, leaving issue living at the testator's death, then unless a contrary intention appears in the Will, the bequest takes effect as a bequest to those issue living at the testator's death.

However, this is subject to a contrary intention shown by the Will. The words used in a Will may cause doubt as to whether s33 WA 1837 has been excluded, and examples include Ling v Ling (2002) and Rainbird v Smith (2012). In the latter case the Will left the residue "upon trust for such of them, my daughters R, J and S, as shall survive me, and if more than one in equal shares absolutely." The court decided that the wording of the Will showed the testatrix's clear intention to leave the residue only to those daughters who

survived her, rather than the share passing to the predeceased daughter's own children. Also, the words, "and if more than one in equal shares" showed specifically that each daughter would get what was intended to increase should any of the other daughters predecease the testatrix. Consequently, s33 WA 1837 did not apply. The wording in Amelia's Will is very similar to that in Rainbird v Smith (2012). Amelia's residuary estate will therefore pass equally to Diana, Geesha and Ishram – Jahil will have no entitlement under the Will.

Question 2

Leo wishes to accept the office of executorship.

Leo has been expressly appointed as executor of Karen's Will and as such he derives his authority to act under the Will as from the date of Karen's death. However, to formally accept the office he must take out probate and prove the validity of Karen's Will. A grant of probate confirms the validity of the Will and his authority to act.

Nell's request for £10,000

Since Karen's Will was made in 2015, under s32 Trustee Act 1925 (as amended by s9 Inheritance Trustees' Powers Act 2014) personal representatives and trustees have power to advance the whole capital of the beneficiary's vested or presumptive share, subject to the consent of any person with a prior interest.

Consequently, Mike, who has a prior life interest in the residue, must consent to any such proposed advancement. Leo must consider whether Nell's request for £10,000 is an 'advancement or benefit' (s32). This phrase has been widely construed, as in Pilkington v IRC (1962), to mean anything that improves the material situation of the beneficiary (including settling property on new trusts). Arguably, Nell has a good case given that she is unemployed, has obtained a degree but Mike should question what she knows about the online retail industry.

Furthermore, £10,000 is probably not a large amount in relative terms, given that Karen has left a 'large estate'. If Leo decides to make an advancement and reasonably believes Nell is trustworthy, he can pay the money directly to Nell as she is over 18 (Re Pauling's Settlement Trusts (1963)). When Nell becomes absolutely entitled upon Mike's death, she must bring the value of her advancement into account against her share.

Oliver – as a minor beneficiary

Leo's duties as executor are to collect in and value all of Karen's assets and debts, pay any debts (including any inheritance tax) and distribute the estate according to the correct order of entitlement (s25 Administration of Estates Act 1925 (AEA 1925)).

Oliver comes into his entitlement following the death of Mike. If Oliver is still a minor at Mike's death, Leo must hold Oliver's share on trust for him pending Oliver attaining his majority upon reaching the age of 18 years. Until Mike's death, Oliver has no automatic entitlement to a share.

Leo – effect of adoption

Leo's position as an adopted child is governed by s67 Adoption and Children Act 2002, which applies to adoption orders made by a court in the United Kingdom. An adopted child is treated as the legitimate child of the adopting person only. Consequently, Leo is treated as the child of Karen's brother, Quinn.

However, s67 is subject to any contrary intention being shown in the Will. For example, in Hardy v Hardy and Anor (2013), the testator gave his residuary estate "for such of my children as shall survive me and attain the age of 21 years". However, the testator also described the adopted child as one of "my son(s)" in an earlier clause in his Will when appointing him as his executor. The court decided that the description of him as one of the testator's "sons" was a clear indication in the Will of the testator's intention that his adopted child should be regarded as one of his "children" in the clause giving his residuary estate to "his children…" Following Hardy, as Karen has also described Leo as "my son" when appointing him executor, Leo will be entitled to receive a one-third share of the residuary estate when Mike has died.

Mike - life interest in the residuary estate

Section 114(2) Senior Courts Act 1981 states that where under a Will (or an intestacy) there is a life interest (or a minor interest) the court usually requires there to be at least two personal representatives or a trust corporation. Where there is only one personal representative, as is the situation with Leo being the sole executor, the court has power upon application by any interested person to appoint an additional personal representative during the subsistence of the life interest or minority interest (s114(4)). Thus, based on the facts, an application could be made by any of the other adult beneficiaries: Mike or Nell.

Question 3

Reeba asks for your advice as to the order in which Pasha's assets should be used to cover the liabilities to the estate.

Pasha's estate is solvent because there are sufficient assets to pay all the debts and liabilities. However, Pasha's Will does not include express directions from which part of his estate they are to be paid.

Reeba should first be advised to consider the debts secured on the two properties owned by Pasha. Secondly, she should then consider the incidence of the unsecured debts.

Section 35 Administration of Estates Act 1925 (AEA 1925) states that when a person dies owning property that is subject to a secured loan or debt, it is the recipient of that property under the Will who assumes responsibility for repaying the loan or debt. Consequently, Reeba should be advised that it is her responsibility to pay the mortgage on the house in Falmouth gifted to her by Pasha. It should be explained to her that although she is not personally liable to pay the mortgage debt, the lender could force a sale of the house if she did not repay the mortgage.

It is important to appreciate that s35 AEA 1925 is subject to a contrary intention shown by the testator. In his Will, Pasha gifts the holiday house to William "free of mortgage". This is an example of a contrary intention and

means that William does not have to be responsible for the payment of the mortgage on the holiday house. The responsibility for payment falls upon Pasha's estate, as the mortgage is treated in the same way as the unsecured debts. Again, if the mortgage is not paid, the lender can force a sale of the holiday house. Because the mortgage of £40,000 on the holiday house is to be paid out of Pasha's estate, the debts and liabilities of the estate will amount to £90,000.

The legacies under clauses 3 and 4 of Pasha's Will amount to £60,000, so £150,000 is needed to pay both the debts and legacies in full.

The available assets only amount to £100,000, so there is a shortfall of £50,000. As Pasha's Will does not include any provision for the payment of unsecured debts, the order of payment is determined by s34 (3) AEA 1925 as set out in Part II Sch 1 AEA 1925. This is known as the statutory order. Where a Will does not specify from where debts and liabilities are to be paid, rules are needed to regulate the burden of the debts and liabilities. These "rules as to incidence" regulate the burden of those debts and liabilities as between the beneficiaries. Creditors are not bound by the rules and they can obtain payment out of any assets of the estate. Part 1 of the statutory order relates to a lapsed share of residue, of which there is none in Pasha's estate.

Part 2 includes the residuary estate, subject to the retention of a fund sufficient to pay the pecuniary legacies of £60,000. It is clear that the residuary estate is not sufficient to pay the unsecured debts and liabilities of the estate together with the legacies referred to in clauses 3 and 4 of Pasha's Will. Indeed, there will be no residuary estate to be paid to Reeba due to the shortfall in the estate.

Part 3 of the statutory order relates to property given by the Will for the payment of debts and part 4 includes property charged with the purpose of payment of debts. Neither are provided for in Pasha's Will.

Part 5 relates to the fund retained to pay the pecuniary legacies.

Part 6 applies to property specifically devised and includes the house in Falmouth and the holiday house. Reeba should be advised that the debts amount to £90,000 including the mortgage of £40,000 on the holiday house.

The residue of the estate is £100,000, but as £60,000 has been retained as a legacy fund, there is only £40,000 available to pay the debts. The shortfall is £50,000, so applying the statutory order, the legacy fund is reduced from £60,000 to £10,000 once the debts and liabilities have been paid in full. Consequently, there is only £10,000 available to discharge the legacies. Due to the insufficiency, they will therefore abate rateably. This will result in Scott receiving £6,000 and Will and Xander each receiving £2,000.

Question 4(a)

Tina's 2012 Will was automatically revoked by her later marriage to Bernard in accordance with the provisions contained in s18(B) Wills Act 1837. Consequently, Tina has died wholly intestate and her estate will be dealt with under the provisions of the Administration of Estates Act 1925 (AEA 1925) as amended and the Intestates' Estate Act 1952 (IEA 1952).

The family home, owned as beneficial joint tenants, will pass automatically to Josh by survivorship and will not form part of the estate to be distributed under the intestacy rules.

Tina's estate is held by her personal representatives on the "statutory trusts" with a power to sell under s33 AEA 1925.

The first duty of the personal representatives is pay all the funeral, testamentary and administration expenses and debts from Tina's cash and any proceeds of sale of other assets. Her estate will then be distributed in accordance with the order of entitlement contained in s46 AEA 1925 as amended by the Inheritance & Trustees' Powers Act 2014 (ITPA 2014).

Priority is given to any surviving spouse and is entirely dependent upon whether the intestate left surviving children; as a result of the changes made by IPTA 2014 the spouse (in a case where the intestate left no issue) no longer shares the estate with any surviving parents or full siblings of the intestate. If there are issue, the intestate's children take on the statutory trusts defined in s47 AEA 1925, which includes not only the surviving children of the intestate, who will share equally if more than one, but also the issue of a child who has predeceased the intestate. If there is more than one issue of the deceased child, they take in equal shares per stirpes their deceased parent's share by stepping into the deceased parent's shoes. Shares due to children or their issue are contingent upon them attaining 18 years of age, or marrying or forming a civil partnership earlier.

As explained above, Bernard is primarily entitled to Tina's estate as the surviving spouse. He is subject to the rule that in order to inherit he must survive Tina by 28 days. If he does, he is entitled to a statutory legacy of £250,000 plus interest set at the Bank of England official bank rate applicable from the date of death until payment, all the personal chattels and half of the residue absolutely (s46 AEA 1925). Personal possessions are defined in s55(i)(x) AEA 1925 (as amended by ITPA 2014) and include all tangible movable property, but excludes money, property the deceased used solely or mainly for business purposes and property held at the intestate's death solely as an investment.

The painting was still owned by Tina at her death and so forms part of her estate. The question is whether the painting is classed as a personal possession or whether it is excluded as a business item or an item solely as an investment. Although in Re Crispin (1974) a valuable collection of clocks and watches was classed as a personal chattel as the items were by their nature articles of personal use, if Re McCulloch (1981) is followed the test for business use is whether the dominant purpose was for business as opposed to personal use. As Tina had arranged for its sale through her commercial contacts it is unlikely that it would be included as a personal possession, regardless of the fact that it was kept at home and so it forms part of her residuary estate.

The remaining half of Tina's residuary estate passes to her children on the statutory trusts. Consequently, Cerys, Yvonne and Zac are entitled to equal 1/3 shares in the half remainder. However, as Yvonne has predeceased Tina her children, Ursula and Victor will take her share per stirpes. As Ursula is 21 years of age, she takes a vested interest and is entitled to a 1/6 share now. As Victor is 10 years of age, he takes a contingent interest subject to him attaining 18 or legally marrying or forming a civil partnership earlier.

Cerys, aged 12, takes a contingent interest, which vests on attaining 18 or if she marries or forms a civil partnership earlier. The fact that she is adopted is irrelevant because she is treated as a child of Tina under s67 Adoption and Children Act 2002. She will be entitled to a one third share.

Question 4(b)

As Tina died intestate, the order of entitlement to a grant of letters of administration to his estate is governed by r22 Non-Contentious Probate Rules 1987.

The order, which follows the statutory order of entitlement found in s46 AEA 1925, provides that the surviving spouse or civil partner is entitled to take out the grant in the first instance.

The children (or their issue if a child has predeceased the intestate) are next in line followed by parents, brothers and sisters of the whole blood (and their children if they have predeceased) and brothers and sisters of the half blood and their children if they have predeceased. Last to be found in the order is more distant relatives. The court prefers an adult to take out a grant of representation in preference to a minor. It also prefers a living person as opposed to the personal representatives of a deceased person.

Thus, Bernard, as the surviving spouse should take out the grant. However, as there are minor beneficiaries two administrators will be required to take out the grant due (s114 (2) SCA 1981). Bernard should take out the grant either with Zac or Ursula.